No. 10-548

IN THE

Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., AND
MINE RECLAMATION CORPORATION,

Petitioners,

v.

NATIONAL PARKS & CONSERVATION
ASSOCIATION ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF NATIONAL PARKS CONSERVATION ASSOCIATION IN OPPOSITION

Deborah A. Sivas
Counsel of Record
Alicia Thesing
Robb W. Kapla
ENVIRONMENTAL LAW CLINIC
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, California 94306-8610
(650) 723-0325
dsivas@stanford.edu

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Where a court finds that an agency, in disposing of federal public lands, (1) failed to take the requisite "hard look" mandated by the National Environmental Policy Act and (2) failed to satisfy the "highest and best use" requirements of the Federal Land Policy Management Act, may the court vacate the decision and remand for further consideration consistent with these statutes?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, National Parks Conservation Association states that it is a non-profit organization with no parent corporations.

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STATEMENT OF THE CASE

The petition for certiorari describes the case that Kaiser Eagle Mountain, Inc. and Mine Reclamation Corporation (collectively "Kaiser") would like to present to the Court, not the case that actually exists. This case challenges a decision by the Bureau of Land Management ("BLM") to dispose of federal public lands adjacent to Joshua Tree National Park for private development of what would become the nation's largest solid waste landfill. Based on a lengthy administrative record, the courts below found that BLM violated core substantive and procedural requirements of two different federal statutes, the Federal Land Policy Management Act of 1976 ("Management Act"), 43 U.S.C. §§ 1701-1787, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347, in approving the land transfer. As federal courts across the nation routinely do every day, the Ninth Circuit Court of Appeals vacated the unlawful agency decision and remanded the matter for further consideration in accordance with applicable law. Contrary to Kaiser's suggestion, no court or individual judge ever held that BLM must or necessarily will make the same decision on remand.

1. At issue here are nearly 4,000 acres of federal public land nestled in the foothills of the Eagle Mountains and surrounded on three sides by Joshua Tree National Park. Resp. App. 3. The Park is an International Biosphere Reserve providing important habitat for desert wildlife, spectacular geologic formations, and "outstanding recreational opportunities" for over one million visitors each year. Resp. App. 67-68. Its "[c]lean and unpolluted air affords distant vistas," and the "natural quiet and

clear night skies are essential for the visitor to realize the beauty and tranquility of the park." *Id.* 67.

Pursuant to congressional directive, the National Park Service manages the vast majority of Joshua Tree as wilderness. Resp. App. 65-66. This wilderness provides a rare "opportunity for recreational experiences that are primitive, nonmechanized, and nonmotorized . . . [and] for solitude." *Id.* 69. The public land targeted for landfill development by Kaiser lies a mile from the Park's boundary. The Park Service's sister agency, BLM, manages this targeted land, along with millions of other acres in the Mojave Desert, pursuant to the Management Act.

2. From 1948 until 1983, Kaiser Steel Corporation operated an open-pit iron mine in the vicinity of the proposed landfill on land patented under 19th century mining laws. It also maintained a 461-acre "Townsite" on land conveyed to Kaiser under Private Law 790, subject to a mandatory reverter once mining activities ceased.[1] During its mining operations on these lands, Kaiser created four deep mining pits from which it extracted over 940 million tons of ore and earth, heaping mine tailings into large waste piles and surface impoundments. In total, Kaiser disturbed over 5,500 acres of land (apparently including some federal property) and left

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[1] Enacted in 1952, PL 790 provided that the 461-acre conveyance "shall" revert to the United States once the use of the property for purposes incidental to mining operations ceased for a continuous period of seven years. Resp. App. C. Although Kaiser ceased mining operations more than a quarter century ago, the federal government has inexplicably declined to exercise the public's reverter in the Townsite parcel.

them unremediated when it ceased mining operations. Resp. App. 2, 92; *compare id.* 6, *with* 34.

Soon thereafter, Kaiser filed for bankruptcy, ultimately obtaining approval for a Plan of Reorganization that extinguished the retirement benefit claims of former employees. Brief of *Amicus Curiae* New Kaiser Voluntary Employees' Beneficiary Association ("VEBA Br.") 1-2. In lieu of funding its prior employee commitments, Kaiser formed a new corporate venture (the parent of current Petitioners), in which its retirees hold a ten percent beneficial interest, to create a new revenue stream from development of a landfill project at the former mine site. *Id.* 3; Resp. App. 5 (explaining that one of Kaiser's primary objectives in developing the landfill is to "[p]rovide a long-term income source for a pension plan that supports retirees of the former Kaiser Steel Corporation").

The 4,654-acre landfill project that Kaiser eventually proposed, however, was not limited to – or even centered around – its own mining-damaged patented lands. Instead, Kaiser sought to acquire 3,942 acres of adjacent federal public land, or 85 percent of the total project site, to construct the landfill, including 3,481 acres of BLM-managed land and permanent fee title to the 461-acre Townsite that would otherwise revert to federal ownership. Resp. App. 24-26. In contrast, a project built entirely on Kaiser's patent land would cover a mere 298 acres. *Id.* 29.

The proposed landfill project is not intended primarily to remediate Kaiser's damaged lands. As designed, it will accept 708 billion tons of rail-hauled waste from Los Angeles County and elsewhere over a

period of 117 years, ultimately filling 2,164 acres with trash. Resp. App. 25. Much of this trash footprint currently is rocky hillside habitat and canyon land unaffected by prior human activity. *Id.* 31-32. Three of the four deep mining pits on Kaiser's patented land will never receive waste and, therefore, will not be "reclaimed" by the proposed project. *E.g.*, *id.* 6, 18, 34 (showing targeted federal lands, existing mining pits, and proposed phasing of landfill activities). One pit ultimately will receive waste, but filling will not begin until the seventy-eighth year of operation and will not be completed until the landfill closes four decades later. *Id.* 21-23.

In exchange for 3,942 contiguous acres of federal land bordering Joshua Tree wilderness, Kaiser offered BLM ten smaller, noncontiguous parcels scattered along the unused Eagle Mountain Railroad right-of-way. Resp. App. 7-10. These 2,846 acres of checkerboard land, situated in a remote and inaccessible area of the desert, face no foreseeable threat of development that would adversely affect their existing habitat value for wildlife. Moreover, Kaiser will not convey these lands in full fee title. Instead, it will retain a 200-foot easement across each parcel to accommodate operation and maintenance of the reactivated rail line. *Id.*

In addition, the proposed land exchange requires BLM to grant newly created rights-of-way over many miles of other federal land along the Eagle Mountain Railroad line and Eagle Mountain Road. These permanent rights-of-way will replace the temporary rights-of-way previously granted to Kaiser under a

reversionary interest,[2] allowing widening and extension of the present road and reactivation of the dormant rail line for waste hauling. Resp. App. 10-16.

3. In processing Kaiser's proposed land exchange, BLM had to satisfy substantive and procedural requirements of both the Management Act and NEPA. These statutes serve very different functions and require wholly separate analyses; findings under one statute are distinct from and independent of findings under the other.

a. *Management Act Requirements.* With passage of the Management Act in 1976, Congress dramatically altered national public land management policies. Breaking with historical efforts to divest and develop public property, the law now provides that federal lands should be (1) "retained in Federal ownership, unless as a result of the land use planning procedure provided for in [the] Act, it is determined that disposal of a particular parcel is in the national interest," 43 U.S.C. § 1701(a)(1), and (2) managed "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8).

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[2] PL 790 granted Kaiser a right-of-way along almost 27 miles of the 52-mile Eagle Mountain Railroad line and along the Eagle Mountain Road that runs across BLM lands adjacent to the eastern edge of the Park. Both of these rights-of-way, like the Townsite property, revert by their own terms to the federal government after seven years of non-use for mining-related purposes. Resp. Pet. 11-12; C.

Accordingly, the Management Act imposes stringent minimum requirements on any disposal of public lands. Before it can approve a land exchange, BLM must demonstrate both that (1) the public interest will be well-served by the transfer and (2) the lands to be exchanged are of equal value. 43 U.S.C. § 1716. To comply with the first requirement, BLM must find that (a) the resource values and public objectives served by disposing of the land outweigh those of retaining it and (b) the intended use of the disposed land will not significantly conflict with management objectives on remaining adjacent federal lands. 43 C.F.R. § 2200.0-6(b). To comply with the second requirement, BLM prepares an appraisal evaluating the "highest and best use" of the land to be transferred. *Id.*; 43 C.F.R. § 2201.3-2(a)(1)-(2). The Uniform Appraisal Standards for Federal Land Acquisitions, to which the BLM must adhere, 43 C.F.R. § 2201.3, define "highest and best use" as '[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future." Pet. App. 15-16. If BLM finds that a proposed land exchange satisfies these two criteria, it may approve the transaction, but is under no statutory compulsion to do so.

b. *NEPA Requirements.* NEPA is our basic federal charter for the environment, 40 C.F.R. § 1500.1(a), declaring "a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-49 (1989). It mandates that an agency "take a 'hard look' at the environmental consequences" of a federal proposal before embarking on any major action. *Balt. Gas & Elec. Co. v. Natural*

Res. Def. Council, Inc., 462 U.S. 87, 97 (1983). As part of this "hard look," the agency must prepare an environmental impact statement ("EIS") disclosing the environmental consequences of the proposal, the unavoidable adverse effects of proceeding with the action, and a reasonable range of comparative alternatives to the project. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.4–1502.14.

The alternatives analysis lies at "the heart of the environmental impact statement." 40 C.F.R. § 1502.14; *see Alaska v. Andrus*, 580 F.2d 465, 474 (D.C. Cir.), *vacated in part as moot sub nom., Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978). It plays the role of "sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. §1502.14. Thus, an EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives." *Id.* The alternatives analysis is tied, in turn, to the scope of the stated purpose and need for the EIS: "The stated goal of a project necessarily dictates the range of 'reasonable' alternatives and an agency cannot define its objectives in unreasonably narrow terms" without violating NEPA. *Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *see also* 40 C.F.R. § 1502.5. In defining the goals of the project and the purpose and need for the EIS, the agency must "look hard" to congressional intent behind the statute authorizing the proposed federal action – here, the Management Act policy of retaining public land in federal ownership and protecting adjacent public resource values. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (Thomas, J.), *cert. denied*, 502 U.S. 994 (1991).

Although NEPA, unlike the Management Act, is a procedural statute, it serves a vital role in the decisionmaking process: "It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson*, 490 U.S. at 349. These functions are particularly important here, where the proposed land transfer runs counter to BLM's general obligation to retain public property.

4. To comply with the Management Act, BLM commissioned a land appraisal by David Yerke. That appraisal considered the "highest and best use" of the targeted public lands to be "holding for speculative investment and future capital appreciation." Resp. App. 104. It did so with full knowledge that the purpose of the exchange was to develop a landfill. *Id.* 90, 95 (noting that "the opinions of value expressed within this appraisal report do not take into consideration any aspects of the proposed landfill project"). Based on this premise, Yerke valued the 3,481 acres of BLM-managed federal land at $79 per acre and the 461-acre Townsite land at $106 per acre.[3] Pet. App. 7-8. Shortly after approval of the exchange, Kaiser conditionally sold the aggregated

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[3] Notably, the *total* appraised value of the Townsite (461 acres × $106 per acre = $48,866) was less than the $61,482 in *monthly* rental payment Kaiser was then receiving under a lease of the property to the State of California for non-mining purposes. Resp. App. E.

property and permits to Los Angeles County for $41 million, or roughly $8,800 per acre. Pet. App. 8 n.1.

5. To comply with NEPA, BLM and the County of Riverside commissioned a joint Environmental Impact Report/Environmental Impact Statement ("EIR/EIS"). The EIR portion of the document was necessary to satisfy the County's responsibilities under the California Environmental Quality Act in connection with its decision to grant local land use approvals for the private landfill project. The EIS portion of the document, by contrast, was necessary to comply with BLM's NEPA obligations in connection with its very different decision to dispose of public lands under the Management Act.

The joint EIR/EIS listed four narrow objectives as the "purpose" for the environmental review: (1) to meet long-term demand for landfill capacity in Southern California, (2) "to provide a long-term income source" from the development of a landfill, (3) to find an "economically viable" use for Kaiser's mining wastes, and (4) to provide long-term "use and development" for Kaiser's Townsite property. Pet. App. 335. BLM refused to give detailed consideration to any alternative that did not satisfy all of these objectives, which meant that Kaiser's commercial interest in generating additional income from, and finding new economic uses for, its old mining facilities[4] foreclosed consideration of any alternative

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[4] In its petition, Kaiser suggests for the first time that the "long-term income source" discussed in the EIR/EIS refers to income "the government" will use to mitigate project impacts. Cert. Pet. 5. This fanciful statement is belied not only by the record and history of this case – where Kaiser argued vigorously that BLM must give priority to the corporation's private

way to meet perceived landfill capacity needs or better manage resource values on BLM lands. The EIR/EIS concluded, for example, that landfill projects "proposed to be located elsewhere" on BLM's vast Mojave Desert holdings were not "true" or "feasible" alternatives under NEPA, despite potentially satisfying regional demand for landfill capacity, because "they do not meet several basic objectives of the Project and/or are not within the jurisdiction of the County of Riverside" and because "[t]here are no reasonable means by which the Project applicant" can satisfy its private goal of generating revenue from development. Resp. App. 37-39.

6. After BLM approved the land exchange, Respondent National Parks Conservation Association ("NPCA") timely protested the decision to the California State Director, duly appealed his denial to the Interior Board of Land Appeals, and ultimately filed suit in district court. NPCA argued that the exchange decision violated the Management Act because the Yerke appraisal undervalued the transferred lands in light of their anticipated use for a landfill and because BLM's public interest finding

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revenue-generating project objectives – but also by the *amicus* brief of former Kaiser employees, who contend that they are depending on the revenue stream from the landfill to fund the promised retirement benefits that Kaiser shed during the bankruptcy proceedings. VERA Br. 3. The environmental monitoring and mitigation funding to which Kaiser's petition refers is not the core project revenue stream described in the purpose and need statement, but rather, an additional $1 per ton "tipping fee" on waste generators imposed as a condition of project approval by both state and federal agencies to blunt initial opposition by the Park Service and others that the landfill is incompatible with surrounding land uses and resource values. Resp. App. 41-42.

for the exchange was not supported by substantial evidence in the record. NPCA also argued that the "purpose and need" statement and related alternatives analysis in the EIS were inadequate to satisfy the agency's separate and independent obligations under NEPA, especially given BLM's finding that the landfill will have "significant" adverse impacts on the wilderness experience in nearby Joshua Tree National Park.[5]

While the matter was pending in the district court, the Ninth Circuit issued its decision in the factually analogous *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000). Reversing the trial court's denial of a preliminary injunction for a similar land exchange at the Mesquite Regional Landfill project in nearby Imperial County, *Desert Citizens* held that BLM's appraisal erred by failing to value the land's anticipated and probable use as a landfill. *Id.* at 1180-87.

After plaintiffs filed their opening summary judgment briefs explaining that Mr. Yerke's appraisal methodology was virtually identical to the one invalidated in *Desert Citizens*, defendants commissioned a new report by Steven Herzog. The BLM District Manager explained that the purpose of Mr. Herzog's report was "to complete a new and

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[5] Respondents Donna Charpied, et al. filed a parallel suit that included additional legal claims beyond those raised by NPCA. Although the two cases were never formally consolidated, they were briefed simultaneously throughout the proceedings, and the lower courts issued joint decisions. Several of the Charpied plaintiffs' separate claims were unsuccessful. This brief does not address their surviving NEPA claim on eutrophication.

expanded analysis of the highest and best use of the federal lands." Pet. App. 302 The resulting report opined that Kaiser's landfill project was not financially feasible in 1997 because it was not needed in the near future. *Id.* 303.

On January 10, 2003, the District Manager penned an internal memo in which he noted that "Mr. Herzog's report more fully articulates why landfill use was not the highest and best use of the federal lands in 1997" and concluded that he "found nothing which indicates that it is necessary to revise or revisit" the September, 1997 decision. *Id.* Three days later, on January 13, 2003, defendants attached this internal memo as an exhibit to their opposition brief in the district court. On January 31, 2003, they submitted a declaration authenticating the Herzog report and BLM internal memo and seeking to "supplement" the Administrative Record – filed with the court years earlier – for the 1997 decision, purportedly in rebuttal to an expert declaration submitted by the Charpied parties.[6] Pet. App. 299. Neither the Herzog opinion nor the internal BLM review memo was an actual appraisal, an agency decision, or part of any formal or informal agency proceeding; both documents were litigation-driven attempts to bolster the flawed methodology and missing analysis in Mr. Yerke's earlier appraisal. *See, e.g.*, Pet App. 306 (explaining that the Herzog

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[6] Kaiser erroneously states that "[i]n their motion for summary judgment in district court, respondents relied on a new appraiser's declaration." Cert. Pet. 8. As Kaiser is well aware, NPCA did *not* submit expert testimony of any kind and consistently opposed the admission of post-decisional expert appraisal testimony.

report "is not an appraisal" and that "this is a matter in litigation and my review may be used by DOJ in defending the litigation").

For this reason, NPCA took the position, as did BLM,[7] that the Administrative Record was limited to the documents considered by BLM *at the time of the land exchange decision*. Consistent with this basic tenet of administrative law, the district court did not consider Mr. Herzog's opinion – or the post-decisional opinion declaration submitted by the Charpied parties – in its decision.

7. After the district court granted in part and denied in part cross-motions for summary judgment, defendants appealed. The Ninth Court affirmed judgment for plaintiffs on four independent grounds. First, it found that BLM failed to properly assess the value of the transferred land in light of its anticipated use as a landfill, in violation of the Management Act and *Desert Citizens*. Pet. App. 22. As had the district court, the Ninth Circuit declined to consider the 2002 post-decisional opinion of Mr. Herzog to support the 1997 Record of Decision because it was not properly part of the administrative record for the land transfer and was not the subject of any subsequent BLM action or decision process. Pet. App. 19 n.5.

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[7] In its opening brief on appeal, for instance, BLM stated: "Neither the Charpieds' extra-record evidence, nor the Herzog report were part of the administrative record before BLM. And neither was addressed by the district court. . . the government submitted the Herzog report only in response to the Charpied's improper submission." Opening Brief of the Federal Government Appellants 33-34.

Additionally and independent of the Management Act violation, the Ninth Circuit held that the EIS was inadequate under NEPA because it unreasonably limited the purpose and need statement, failed to consider a reasonable range of alternatives to the proposal, and insufficiently addressed the landfill's introduction of nutrients into the desert environment. Pet. App. 22-29, 31-33.

In reversing the district court's conclusion that BLM's "public interest" finding under the Management Act was not supported by the record, the Ninth Circuit concluded only that: "Though we do not necessarily agree with the BLM's public interest determination, the record as a whole establishes that the BLM's interpretation of 'full consideration,' as evidenced by the analyses in the EIS, is permissible under 43 U.S.C. § 1716(a)." Pet. App. 22. Thus, contrary to Kaiser's central premise here, the majority did not hold that the landfill project is necessarily in the public interest or that BLM made an immutable public interest finding that cannot and will not be revisited upon remand, once all impacts, reasonable alternatives, and statutorily prescribed considerations are properly considered.

In his colorful dissent, Judge Trott focused, as does Kaiser here, on the "safety" of the proposed landfill – something never put at issue by this case – and misapprehended the facts in two ways relevant to the current petition. First, the dissenting analysis is premised on the mistaken belief that Mr. Herzog's post-decisional report and BLM's internal review memos "were made part of the administrative record" and constituted a "final, appealable decision." Pet App. 95-96. The conclusion of the majority, and the

lower court before it, was precisely the opposite; they correctly found that these *post hoc* rationalizations were not properly part of the administrative record and, therefore, should not be considered by a reviewing court.

Second, the dissent incorrectly conflated the "public interest" requirement of the Management Act with the separate and independent environmental review and disclosure requirements of NEPA. Judge Trott concluded that BLM's public interest finding negated any concern about the legality of the purpose and need statement or alternatives analysis. Pet. App. 54. Thus, the dissent did not find "harmless error" or error of any kind. Judge Trott simply disagreed with his colleagues that NEPA obligations operate independently of the Management Act. The same flawed thinking undergirds Kaiser's arguments before this Court.

8. Kaiser, but notably not the federal government, petitioned for rehearing and rehearing *en banc*, on the grounds that the majority's "purpose and need" holding conflicts with prior Ninth Circuit precedent, the EIS adequately considered eutrophication impacts, and the Herzog opinion should have been considered dispositive on the question of "highest and best use." Kaiser did *not* argue that the decision conflicts with the law of other circuits or this Court, that the NEPA violations constituted "harmless error," or that remand of the alternatives analysis would be "pointless." After making minor modifications to the original decision, the Ninth Circuit denied the petition, without dissent.

REASONS FOR DENYING THE WRIT

This case does not implicate the "harmless error" standard or create a circuit split of any kind. Like other circuits, the Ninth Circuit refuses to "fly-speck" NEPA documents for minor errors or elevate "form over substance" in reviewing agency decisions. *See, e.g.*, *Churchill County v. Norton*, 276 F.3d 1060, 1081 (9th Cir. 2001) (Paez, J.) (holding that it is "not [the court's] role" to "fly-speck" an EIS), *amended by* 282 F.3d 1055 (9th Cir. 2002); *Swanson v. U.S. Forest Service*, 574 F.3d 723, 746 (9th Cir. 1996) (explaining that courts should not "fly-speck" an EIS or "hold it insufficient on the basis of inconsequential, technical deficiencies"); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (explaining that "[t]he APA requires courts to take 'due account of harmless error" and finding that notice violations under the Endangered Species Act were harmless); *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 527 (9th Cir. 1994) (holding that "even where there is a violation of NEPA's procedural requirements, relief will not be granted if the decision-maker was otherwise fully informed as to the environmental consequences and NEPA's goals were met"); *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765 (9th Cir. 1986) (applying harmless error test to Management Act notice violations); *Cady v. Morton*, 527 F.2d 786, 796 (9th Cir. 1975) (holding that a court may not set aside an EIS because it "would have preferred a somewhat more detailed and better organized treatment").

Unlike these decisions and the decisions from other circuits on which Kaiser relies, this case is about *harmful* error. The majority concluded that

BLM did not properly value the public lands targeted for divestment or comply with NEPA's pivotal requirement to consider a reasonable range of alternatives to the proposed federal land transfer. These violations go to the very heart of the Management Act and NEPA, significantly undermining congressional policies embedded in both laws. The fact that BLM *could* come to the same decision after it remedies these major statutory violations does not mean that the agency's original errors were harmless.

In its attempt to squeeze this case into the "harmless error" box, Kaiser's petition mischaracterizes both the facts and the law. The provocative question it puts before the Court is whether a remand constitutes error when further proceedings "will have no effect on the agency's decision or serve any other substantive purpose." Cert. Pet. i. The obvious answer to that question is "yes," in the Ninth Circuit as elsewhere. But this is not such a case. Nothing in the majority decision or the record suggests that the remand will have "no effect" on BLM's decision, notwithstanding Kaiser's repetitive use of adjectives like "pointless," "meaningless," "inevitable," "futile," and "formalistic." The purpose of the remand is to ensure that BLM takes a fresh and more meaningful look at the value of the public lands to be exchanged and at alternative means of achieving the federal government's public land management objectives. The Court should assume that the agency will perform this review in good faith and that its new analysis will inform future decisions, just as Congress intended. *See Robertson*, 490 U.S. at 349 (explain that "NEPA ensures that important effects will not be overlooked

or underestimated" and "inevitably bring[s] pressure to bear on agencies 'to respond to the needs of environmental quality'").

Kaiser's argument, framed for the first time here as a circuit split, is built almost entirely on the erroneous premise that BLM's "public interest" finding ends the inquiry. It does not. The public interest requirement is but one hurdle that BLM must clear before disposing of public land, and a discretionary one at that. Once BLM takes the requisite hard look at alternative ways to achieve the objectives of the Management Act during remand, it may well decide that the public interest is better served by a different use of the targeted lands or that Los Angeles County's interest in additional desert landfill space beyond the new Mesquite Regional Landfill can be met on other, less sensitive land. BLM is not statutorily compelled to approve Kaiser's proposed land transfer or to privatize any public lands, especially those serving as buffer for precious wilderness resources. To the contrary, the Management Act strongly encourages retention of federal public land, making alienation the exception rather than the rule. There is thus no reason for any court to conclude that BLM will reach the same result on remand.

Ultimately, this case involves an ordinary challenge to an administrative agency decision where the court found serious reversible error. As such, it provides a poor vehicle for the Court to take up any legal question, let alone one that was not squarely presented below. On the merits, the Court would have to delve deeply into a 60,000-page factual record to determine whether the majority was correct in

finding legal error and whether each error identified below was nonetheless "harmless." And even were this Court to sit as a court of error and reverse the lower court's application of the law to the facts, it would not thereby clarify an unsettled question of federal law or resolve a circuit split because the Ninth Circuit already applies the same "harmless error" rule as other circuits when remand will serve no purpose. In short, nothing about this case warrants the Court's review.

I. The Majority Remanded BLM's Land Transfer Decision to Remedy Serious Legal Error that May Affect the Outcome of the Agency Decisionmaking Process.

Kaiser's petition turns on the unfounded assumption that remand of the NEPA and Management Act violations for further agency consideration serves no purpose because BLM will ignore the court's directive and blindly adhere to its prior conclusions. There is no support in the record for such an assumption, which "runs contrary to the presumption to which administrative agencies are entitled – that they will act properly and according to law." *F.C.C. v. Schreiber*, 381 U.S. 275, 296 (1965). The majority concluded that BLM engaged in significant legal errors, not trivial paperwork violations, and remanded for reconsideration of the land transfer decision once a proper appraisal and alternatives analysis are completed. BLM presumably will comply in good faith with that decision.

A. The Failure of the Yerke Appraisal to Consider the Land's Probable and Intended Use as a Landfill Was Not Harmless Error.

Kaiser's focus on the exclusion of the post-decisional Herzog report ignores the lower court's actual merits holding under the Management Act. The court carefully reviewed the record and applied its earlier *Desert Citizens* analysis to conclude that Mr. Yerke's appraisal, on which the Record of Decision was based, did not comply with the Management Act. Even if admitted into evidence, Mr. Herzog's *post hoc* opinion cannot salvage the Yerke appraisal because it suffers from the same fatal flaw.

The Management Act implementing regulations provide that "[h]ighest and best use means the most probable legal use of a property," and the Uniform Appraisal Standards applicable to federal land transactions define highest and best use as the "most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future." Pet. App. 15-16. Applying this standard, *Desert Citizens* held that the "existence of other landfill proposals in the region indicated a general market for landfill development." 231 F.3d at 1181. The same logic, the court held, necessarily follows here: "[W]e held in *Desert Citizens* that the presence of competing proposals alone is sufficient to establish market demand and financial feasibility. . . . If the Kaiser landfill proposal was sufficient to establish a reasonable probability of the Mesquite Landfill's financial feasibility, then Mesquite Landfill and other proposals must demonstrate similar feasibility of the Kaiser project." Pet. App. 18.

Defendants' argument below was that BLM's market analysis for Eagle Mountain did not show evidence of market demand. But this argument "misses the point entirely" because in *Desert Citizens*, the court "looked not to any BLM market analysis, but rather to the obvious and well-known presence of competing landfill proposals. . . . Indeed, [the court] found the appraiser's willful ignorance of facts of 'general notoriety' 'particularly troubling.'" Pet App. 18. Because here, as there, "it was the specific intent of the exchange that it be used for that purpose," the majority reiterated that "[t]here is no principled reason why the BLM, or any federal agency, should remain willfully blind to the value of federal lands by acting contrary to the most elementary principles of real estate transactions." *Id.* 20. Because the facts of this case are "virtually identical" to the facts in *Desert Citizens*, *id.* 17, BLM's appraisal and resulting decision to grant the land exchange violated the Management Act.

Mr. Herzog's *post hoc* litigation-driven opinion that the proposed landfill was not financially feasible due to lack of market demand or need for landfill capacity cannot cure this legal defect – and is plainly at odds with BLM's simultaneous determination that public need for landfill capacity outweighed protection of nearby wilderness resources. The theory advanced in Mr. Herzog's report is the same one advanced by the appraiser and rejected by the court in *Desert Citizens*. The court held that the posited "need" for landfill capacity – discussed at length in the Eagle Mountain EIS – driving this proposal and a number of others was dispositive evidence of market demand. The court's conclusion would not, therefore, have changed even if Mr.

Herzog's *post hoc* rationalization had been added to the Administrative Record for the decision.

Moreover, the dissent is incorrect when it says that the Herzog report was "formally made part of the administrative record." Pet. App. 96. The majority opinion concluded that the document was *not* properly part of the Administrative Record because it was prepared during litigation, years after the Record of Decision, to bolster and expand the Yerke appraisal. *See* Pet. App. 19, n.5. This Court has long held that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1972); *see also Fed. Power Comm'n v. Transcontinental Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (explaining that the Court has "consistently expressed the view that ordinarily review of administrative decisions is to be confined to 'consideration of the decision of the agency . . . and of the evidence on which it was based'" and holding that an agency decision which "is not sustainable on the administrative record made . . . must be vacated and the matter remanded . . . for further consideration"); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971). Thus, "[p]arties may not use 'post-decision information as a new rationalization either for sustaining or attacking the Agency's decision.'" *Center for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006) (citations omitted). The post-decisional Herzog report and internal memos prepared to rationalize BLM's earlier decision cannot, consistent with this precedent, properly be "made a part of the administrative record" for that decision.

On remand, BLM must revisit the legally defective appraisal methodology used by both Yerke and Herzog and develop a new valuation consistent with the Management Act. There is no evidence in the record to support Kaiser's conjecture that BLM will ignore the court's direction and "adhere to its decision so that further proceedings will be entirely futile." Cert. Pet. 25. That BLM *could*, in theory, brush aside the judicial interpretation and readopt the same valuation does not render the appraiser's error legally "harmless." At the very least, taxpayers and other concerned citizens must have the ability to administratively appeal or judicially challenge any decision based on a new appraisal.[8]

In sum, further review of the Management Act appraisal claim is not a simple matter. Minimally, the Court would have to (1) override longstanding precedent on the scope of administrative records, (2) consider and weigh competing post-decisional opinion testimony from BLM and the Charpied parties on the propriety of the Yerke appraisal methodology under BLM regulations and uniform federal appraisal standards, and (3) factually distinguish or overrule the Ninth Circuit's well-reasoned analysis in *Desert Citizens* – a result Kaiser does not seek in its petition.

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[8] The suggestion that BLM's internal review memos were "final, appealable decisions" gets no purchase either. Pet. App. 96. Those memos were prepared *three days* before they were submitted to the court, as exhibits to a summary judgment brief, to justify defendants' litigation position. NPCA vigorously objected to their admission into evidence at both the district and appellate courts. The notion that NPCA should or could have administratively appealed or challenged the memos in some other way is fatuous. Cert. Pet. 9, 25.

B. BLM's NEPA Violations Were Not Harmless Error.

Kaiser's "futility" argument is even less cogent as applied to BLM's NEPA violations. BLM's restrictive "purpose and need" statement and the resulting overly narrow alternatives analysis were not merely "error in an agency's formulation of a paragraph in an EIS," Cert. Pet. 26, and BLM did not just "technically err in this one summary paragraph." *Id.* 27. As the courts have held, although "[e]nvironmental impact statements take time and cost money . . . an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." Pet. App. 23-24 (quoting *Citizens Against Burlington*, 138 F.2d at 196).

Yet that is precisely what happened here. BLM considered in detail only the proposed land transfer, three alternate versions of the same transfer, and the statutorily required no-action alternative. The EIS expressly attributed this constricted alternatives analysis to the narrow project goals. Two "primary objectives" of the proposed transfer, the document explained, were to develop new landfill capacity for Southern California and "to obtain economic benefits from Kaisers' [sic] former Eagle Mountain Mine Site." Resp. App. 37. Thus, a landfill on other Kaiser property, waste diversion, alternative landfill locations, landfill mining, and alternative Townsite locations or uses "were not analyzed in detail because they do not meet the basic objectives of the Project

and/or are not within the jurisdiction of the County of Riverside." *Id.* That is, because the EIS essentially defined the purpose of the land exchange as "development of a landfill on federal land adjacent to the former Kaiser mining pits and Townsite," there was no viable alternative to Kaiser's proposal.

The majority correctly recognized that NEPA does not countenance such a tautology. While the applicant's purpose for the project "may provide useful background information . . . [i]t is the BLM purpose and need for the action that will dictate the range of alternatives." Pet App. 26-27. The purpose and need for any particular federal action necessarily is dictated by "the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives." *Id.* 25 (quoting *Citizens Against Burlington*, 983 F.2d at 196). Here, Congress' view is loud and clear. Federal public lands should be retained in federal ownership unless the public will be better served – indeed "well-served" – by their divestiture. 43 U.S.C. § 1716(a). Congressionally disfavored land transfers are appropriate only where the intended use of the disposed land will not significantly conflict with management objectives on remaining adjacent federal lands. 43 C.F.R. § 2200.0-6(b). Thus, in identifying alternatives to a land exchange whose purpose is to satisfy public landfill needs, BLM must evaluate other, less harmful options that do not impact Joshua Tree.

Given BLM's governing mandate under the Management Act, the majority properly concluded that Kaiser's private objectives – to provide income

from the mine site, to find a viable use for its mine waste and overburden, and to revive and develop the remote Townsite property – must be acknowledged and considered, but may not drive the exclusion of other viable alternatives from consideration or foreordain approval of the land exchange. Pet. App. 29. If NEPA is to serve its intended purpose of meaningfully informing agencies and the public, the EIS must "rigorously explore and objectively evaluate all reasonable alternatives" so that "reviewers may evaluate their comparative merits," including alternatives not within the agency's jurisdiction.[9] 40 C.F.R. § 1502.14. Here, BLM's narrowly drawn purpose and need statement sidestepped this statutory obligation. That error was hardly "harmless"; in remedying it, BLM may and should reconsider the wisdom of placing a massive garbage dump, with its attendant environmental, aesthetic, and recreational impacts, adjacent to Joshua Tree National Park, the crown jewel of desert wilderness experience.[10]

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[9] Kaiser's suggestion that an agency need not "study alternatives that it had no power to implement" misapprehends the law and the facts. Cert. Pet. 26. The NEPA regulations expressly require that an EIS consider "reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. § 1502.14(c). Moreover, it undoubtedly *is* within BLM's power to divest less sensitive land elsewhere in the Mojave Desert if there remains a need for more waste disposal capacity now that the Mesquite Regional Landfill is operational. *See* http://www.mrlf.org/.

[10] That the dissent did not agree with the majority's holding is clear, but Judge Trott's concern that "[a]gencies . . . are precluded from completely ignoring a private applicant's objectives" is misplaced. Pet. App. 47. The question

C. BLM's Public Interest Finding Does Not Render Its Other Statutory Violations "Harmless."

The dissent below and Kaiser here claim that BLM's "public interest" determination is sufficient to cure any other statutory violation. That notion is simply wrong. As the majority correctly understood, "whether the BLM gave full consideration to the [Management Act's] public interest factors, however, has no bearing on the sufficiency of the EIS." Pet. App. 29 n.9. Compliance with NEPA is the "means" to a fully informed "end," not "an empty and meaningless exercise in 'frivolous boilerplate.'" Cert. Pet. 30.

Kaiser's theory is that the Ninth Circuit "decisively settled" the question of whether the land exchange comports with the public interest, that "[BLM's] command [to undertake the land exchange] is not seriously contestable," that "there is no prospect that BLM will reverse its determination to do so," and that, therefore, any error in the NEPA alternatives analysis "did not affect the agency's judgment." Cert. Pet. 28-29. Each of these brash statements is incorrect.

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before the court was not whether a private party's economic interests can be ignored, but whether those interests can *dictate* the federal government's land management and retention options. The answer to that question surely is "no." Otherwise, a private party who wants to acquire or use federal land can effectively guarantee that outcome with a well-crafted sentence or two in the purpose and need statement, circumventing the whole purpose of NEPA.

First, although the court found BLM's interpretation of its own regulations implementing the public interest requirement to be "permissible," it certainly did not hold that the public interest determination was "decisive" of anything. Indeed, the majority noted that while it did "not necessarily agree with the BLM's public interest determination," it was constrained by its judicial review role to defer to the agency's construction of the statute. Pet. App. 21-22. Nothing in the holding or the record suggests that BLM must reach the same conclusion next time, when it has before it a more robust evaluation of alternatives that might better serve the public interest.

Second, Kaiser's assertion that BLM's public interest finding or the Management Act itself "command[s]" the agency to undertake the land exchange badly misreads the law. As explained above, the overarching policy behind the Management Act is to *retain* public lands and manage them for their "scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8). Land exchanges constitute a tightly circumscribed discretionary exception to this policy, not a statutory command or private right. The law does not in any way compel BLM to grant a land exchange, even one that has some public benefit. The public interest determination is thus a necessary but not sufficient prerequisite for the outcome Kaiser seeks.

Third, there is nothing in the record or the law to support Kaiser's brazen assertion that there is "no prospect" that BLM will reverse its decision to grant

the land exchange. Kaiser may believe it has captured the agency, but the courts must assume that BLM will act in good faith in responding to the Ninth Circuit's decision on remand. Hoped-for agency intransigence in the face of a judicial directive cannot possibly be the basis for a "harmless error" determination.

Finally and most important, Kaiser's assertion that the NEPA violations did not affect BLM's judgment cannot be squared with the law or the facts here. As this Court explained in *Robertson*, "[NEPA's] procedures are almost certain to affect the agency's substantive decision." 490 U.S. at 350. The very purpose of NEPA's procedural requirements is to "infuse" our "broad national commitment to protecting and promoting environmental quality" into the "ongoing programs and actions of the Federal Government." *Id.* at 348. NEPA achieves this objective through the "action-forcing" vehicle of an EIS, which ensures that agencies do not overlook environmental consequences or possible alternatives and "gives the public assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process.'" *Id.* at 349. The error here was not a meaningless paperwork violation; it was a pernicious failure to consider other ways that BLM might satisfy its various competing Management Act obligations.

II. Because the Ninth Circuit Already Follows the "Harmless Error" Rule, There Is No Conflict Among Circuits or With This Court's Precedent.

Kaiser's petition is spun from the fiction that the Ninth Circuit refuses to embrace a "harmless error" rule when reviewing administrative agency decisions. This contention is particularly ironic given that Kaiser argued in its petition for rehearing *en banc* (on the issue of eutrophication) that the Ninth Circuit *does* apply a harmless error test, citing *Churchill County v. Norton*, 276 F.3d at 1081, *Cady v. Morton*, 527 F.2d at 796, and similar NEPA cases. Defendant-Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* 13. Specifically, the Ninth Circuit employs the harmless error rule "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004) (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982)).

Much like this Court and others, the Ninth Circuit has carefully and prudently shaped the contours of the harmless error doctrine:

> The APA requires that we take "due account" of the harmless error rule. *See* 5 U.S.C. § 706. It's true, as plaintiffs argue, that we must exercise great caution in applying the harmless error rule in the administrative rulemaking context. The reason is apparent: Harmless error is more readily abused there than in the civil or criminal trial context. An

> agency is not required to adopt a rule that conforms in any way to the comments presented to it. So long as it explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary. Thus, if the harmless error rule were to look solely to result, an agency could always claim that it would have adopted the same rule even if it had complied with the APA procedures. To avoid gutting the APA's procedural requirements, harmless error analysis in administrative rulemaking must therefore focus on the process as well as the result.

Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1497 (9th Cir. 1992).

The Ninth Circuit does not hesitate to apply this rule in appropriate NEPA cases. In *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000), for instance, the agency initially failed to evaluate new, post-decisional information to determine whether a supplemental EIS was required. The Ninth Circuit nonetheless declined to enjoin the underlying agency action because, during the course of the litigation, the agency took a "hard look" at the new data and determined that they were not sufficiently significant to warrant a supplemental EIS under NEPA's governing standard. *Id.* at 560 (citing *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1025-26 (9th Cir. 1980), which held, on a similar claim, that it would be pointless to order the supplemental study of new information that had since been completed). Thus, where remand will truly have no effect because the agency has already

completed the missing analysis, the Ninth Circuit invokes the harmless error rule. That is not the situation in this case, however.

The Ninth Circuit's approach differs not at all from precedent elsewhere. This Court applies a harmless error rule to agency decisions "when a mistake of the administrative body is one that clearly has no bearing on the procedure used or the substance of the decision reached." *Mass. Trustees of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964). It recently followed this approach in *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), where challengers argued that EPA's transfer of the Clean Water Act permitting program to the State of Arizona failed to satisfy the consultation requirements of the Endangered Species Act. Although EPA voluntarily sought consultation before making the decision, the agency subsequently changed its mind and concluded that no consultation was required by law, an interpretation upheld by the Court. *Id.* at 660. Thus, remand of the matter to EPA for further clarification of this "internal inconsistency" was not warranted as it "could have had no effect on the underlying agency action being challenged." *Id.* at 659. A similar question of the agency's legal authority animated the harmless error discussion in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (declining to remand enforcement order which incorrectly cited an adjudicatory "rule" from another case when agency "unquestionably" had independent legal authority to enforce the challenged order, meaning "[t]here is not the slightest uncertainty as to the outcome of a proceeding before the Board, whether the Board acted through a rule or an order."). Thus, the decisions of

this Court to which Kaiser cites are not at odds with the Ninth Circuit's formulation of the harmless error rule.

The same is true of Kaiser's authority from other circuits, specifically including the D.C., First, Seventh, and Eighth Circuits. Cert. Pet. 20-24. In *Nevada v. Dep't of Energy*, 457 F.3d 78 (D.C. Cir. 2006), the EIS evaluated a variety of truck and rail haul alternatives for a nuclear disposal project, but did not specify the agency's preferred alternative. The court found this error harmless because the agency subsequently announced its preferred alternative in the Federal Register, "thereby allowing the public to address comments more specifically to that" alternative and ensuring that "relevant information [was] available to those participating in agency decision-making." *Id.* at 90-91 (citing, among other cases, the Ninth Circuit's harmless error holding in *Laguna Greenbelt*, 42 F.3d at 527).

In *Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49 (1st Cir. 2001), the court reviewed and affirmed the agency's conclusion that the project did not warrant an EIS, although that conclusion was not articulated in a formal "finding of no significant impact." The court declined to remand "for a differently named assessment, where the project's negative consequences have already been analyzed and found to be absent and the findings have been disclosed to interested parties," noting that "[i]f there was error in denominating the assessment, it was patently harmless." *Id.* at 62.

In the two-page *Glisson v. U.S. Forest Service*, 138 F.3d 1181 (7th Cir. 1998), challengers complained that the environmental assessment for a

restoration project did not discuss an inconsistency with state law, as required by the NEPA regulations. The court refused to remand on this ground, explaining that even if the assessment had discussed the state law, "it would doubtless have concluded that since the State of Illinois has approved the ecological-restoration project and has never indicated that it considers the shortleaf pines . . . endangered, and since two substantial stands of native shortleaf pines . . . . will remain, the impact on the pines is not an adequate reason for blocking the project." *Id.* at 1183.

And in *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1129 (8th Cir. 1999), the EIS sufficiently evaluated "ten alternative [wilderness management] plans" based on different "visitor use levels." The case does not stand, as Kaiser asserts, for the proposition that an error in failing to study unviable alternatives is harmless. Cert. Pet. 24. Rather, the Eighth Circuit found that the EIS considered a reasonable range of alternatives to the preferred plan because it evaluated alternatives for current, increased, and decreased use, as well as an alternative that would redistribute existing use. Given that visitor use levels were already straining wilderness resources and degrading recreational experiences, the court concluded that NEPA did not require consideration of any additional increased-use scenarios. *Id.* In short, there was no NEPA error, harmless or otherwise. [11]

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[11] Without discussion, Kaiser also misleadingly quotes *Friends of the River v. F.E.R.C.*, 720 F.2d 93 (D.C. Cir. 1983). There, the D.C. Circuit admonished that "courts have low tolerance for futility arguments" in NEPA cases, but explained

Unlike each of Kaiser's cited cases, the majority here found substantial procedural and substantive error. Thus, the issue is not whether the Ninth Circuit refused to employ a harmless error test or engaged in fly-specking.[12] It did neither. The issue is whether the fact-based finding of *harmful* error merits this Court's review. NPCA respectfully submits that it does not.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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that the "special circumstances" before it warranted a different result because there was a "cogent demonstration . . . that the agency gave due consideration to the relevant environmental factors and made that consideration manifest in an accessible, intelligible form" *before* making the final decision. *Id.* at , 106-08.

[12] Ironically, Kaiser cites *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683 (10th Cir. 2008), as "indistinguishable" from this case. Cert. Pet. 28. Noting that NEPA requirements "are not ones that we are free to disregard," that court held that failure to consider a reasonable range of alternatives "was more than a mere flyspeck and thwarted NEPA's purposes"; it thus *remanded* for further analysis even while acknowledging that "BLM is not precluded from making the same determination again." *Id.* at 715.

Respectfully submitted,

Deborah A. Sivas
Counsel of Record
ENVIRONMENTAL LAW CLINIC
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, California 94306-8610
(650) 723-0325
dsivas@stanford.edu

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